No. _____

In The Supreme Court of the United States

ALEASHIA CLARKSTON and KINGDOM BUILDERS COMMUNITY DEVELOPMENT CORP.,

Petitioners,

v.

JOHN WHITE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In an action under section 1983, government officials are entitled to qualified immunity if their conduct did not violate a clearly established constitutional right. The question presented is:

> Did the Fifth Circuit err in holding that there is a second type of qualified immunity—that government officials are also entitled to qualified immunity, even when they violate clearly established constitutional rights, and "no matter how unconstitutional their motives," if it was unclear at the time of the violation whether relief was available in an action "under section 1983" for the injuries caused by those constitutional violations?

PARTIES

The parties to this action are set out in the caption.

CORPORATE DISCLOSURE STATEMENT

Kingdom Builders Community Development Corporation has no parent corporation, and no publicly held company owns 10% or more of petitioner's stock.

RELATED PROCEEDINGS

Clarkston v. White, 943 F.3d 988 (5th Cir. Dec. 4, 2019)

Clarkston v. White, 941 F.3d 229 (5th Cir. Oct. 25, 2019)

Clarkston v. White, 2018 WL 4387620 (M.D.La. Sept. 14, 2018)

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Petitioners Aleashia Clarkston, *et al*., respectfully pray that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on December 4, 2019.

OPINIONS BELOW

The December 4, 2019 opinion of the Court of Appeals, which is reported at 943 F.3d 988 (5th Cir. 2010), is set out at pp. 1a-8a of the Appendix.[1] The September 14, 2018, opinion of the District Court, which is unofficially reported at 2018 WL 4387620 (M.D.La.), is set out at pp. 9a-15a of the Appendix.

JURISDICTION

The original decision of the Court of Appeals was issued on October 25, 2019. Petitioners filed a timely petition for rehearing. On December 4, 2019, the court of appeals denied rehearing, but modified its earlier opinion. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

[1] An earlier opinion, reported at 941 F.3d 229 (5th Cir. 2019), was withdrawn and replaced by the December 4 opinion. The opinions differ only in the wording of footnote 5.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the Constitution states in pertinent part, "Congress shall make no law ... abridging the freedom of speech...."

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

STATEMENT OF THE CASE

Legal Background

Government officials sued in federal court for constitutional violations may ordinarily assert qualified immunity from such claims. Whether qualified immunity is available turns on whether a defendant's conduct violated the plaintiff's clearly established constitutional rights. Resolution of a qualified immunity claim thus is determined by an assessment of the constitutional decisions of this Court and the lower courts at

the point in time when the asserted constitutional violation occurred.

This case concerns a new type of qualified immunity, first devised by the Fifth Circuit in 2015. This novel form of immunity turns, not on the state of the law regarding the constitutional *rights* of the plaintiff, but on the state of the law regarding whether section 1983 provides a *remedy* for the alleged violation. 42 U.S.C. § 1983. Section 1983 provides the private cause of action usually relied on by plaintiffs asserting constitutional claims against state or local officials. Section 1983 does not itself contain any substantive rights, and an official cannot violate section 1983. The terse wording of section 1983, adopted in 1871, does not address the numerous remedial issues that a more modern statute would often deal with expressly, such as who can be sued, under what conditions, when, and for what remedies. For that reason, section 1983 has been the subject of considerable, and continuing litigation, both in this Court and in the lower courts. Under the novel Fifth Circuit qualified immunity doctrine, a government official is entitled to qualified immunity, even though he or she violated clearly established federal constitutional rights, if (at the time of the violation) the availability of relief under section 1983 was not yet clearly established. This new Fifth Circuit qualified immunity, unlike the qualified immunity recognized by the decisions of this Court and all other circuits, is provided to government officials "no matter how unconstitutional their motives."

Factual Background

This case arises out of an application to operate a charter school in Lafayette Parish, Louisiana. That application was submitted in early 2015 by Kingdom Builders Community Development Corporation ("Kingdom Builders"). Dr. Aleashia Clarkston is the CEO of Kingdom Builders.

The application was initially submitted to the Lafayette Parish School Board. The local school board turned down the application for technical reasons, concluding that the application lacked sufficient information on a number of relevant matters. App. 3a, 10a.

State law permits an applicant in such circumstances to submit a new application to the Louisiana Board of Elementary and Secondary Education ("BESE"). La. R.S. 17:3983(A)(2)(a)(i). Applicants may include in that BESE application material not contained in their initial application to the local school board. The local school board is not a party to the application proceeding before BESE, and BESE passes on such a new application de novo.

Pursuant to these state procedures, Kingdom Builders submitted an application to BESE in June 2015. This application contained additional material that addressed the concerns that had been raised by the local school board. Consistent with state law, BESE referred the application to an outside firm, School Works, for evaluation. School Works concluded that the application met all relevant standards, and

recommended that BESE approve the application for the proposed charter school. App. 3a, 10a.

Under state law, however, the Superintendent of the Louisiana Department of Education is also authorized to make recommendations to BESE. La. R.S. 17:22. White testified that it was "rare" for BESE to disagree with his recommendations regarding charter school applications.[2] In November of 2015 the Superintendent, defendant John White, notified Kingdom Builders and Dr. Clarkston by telephone that he intended to oppose approval of the application. Both White and Clarkston testified that the reason that White gave for his opposition concerned the fact that almost three years earlier, in 2013, Dr. Clarkston had appeared on one episode of a television show, *Supernanny.*[3]

On December 1, 2015, at a public meeting of BESE, White opposed approval of the application. White testified that in addition to that public opposition, he met privately with BESE members and indicated to them that he opposed the application because of Dr. Clarkston's appearance on *Supernanny.*[4] Over the course of the subsequent litigation, White gave

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[2] ROA 562.

[3] Dep. of Aleashia Clarkston, p. 38 (ROA 527) ("Superintendent White specifically stated that the model of our school was sound, it would be a good fit, all of the above, you know, a lot of accolades for all of our hard work, and he said his only reason for denial was based on the Supernanny show."); Dep. of John White, p. 38 (ROA 620)).

[4] Dep. of John White, pp. 33-34, 56 (ROA 615-16, 636).

varying accounts of why he objected to Dr. Clarkston's appearance on the television show. Initially defendant indicated that the objection related to Dr. Clarkston's comments about how she disciplined her own children.[5] Defendant's most recent account was that he objected to discussing disciplinary issues at all "on national television," and that he did not care or even recall what Dr. Clarkston had said on the program.[6]

At its December 1 meeting, BESE rejected the charter school application. Plaintiff objected to that action, at least in part because the applicable standard for approving a charter school concerned only the content of the proposal, not criticism of prior television appearances by an officer of the entity that had

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[5] Memorandum in Support of Defendant's Motion for Summary Judgment, Doc. 28-1, p. 13 ("[it was permissible for Clarkston's] statements regarding an issue which is pertinent to education, such as corporal punishment in the case at hand, taken into consideration....").

[6] Original brief for Defendant-Appellee John White, available at 2019 WL 829254, at *4:

> Defendant-Appellee's basis of his recommendation was that he did not think the airing of children's disciplinary issues on national television reflects the kind of leadership judgement that he would require of a principal that he would hire or recommend to the board that they hire. Defendant-Appellee's decision had nothing to do with corporal punishment, but about a leader's decision to air issues with children on national television. In fact, Defendant-Appellee does not even recall the substance of what Plaintiff-Appellant Clarkson said on the television show; nor does he recall her opinion on corporal punishment on the television show.

submitted the application. In January 2016, BESE relented, and decided to refer to the application for a second outside evaluation by a different firm, Transcendent Legal. Transcendent Legal was directed to assess the concerns raised by White regarding Clarkston's appearance on *Supernanny*.[7]

Transcendent Legal's report to BESE was inconclusive; it contained no recommendation regarding whether the application should be approved. The report did express some concerns about Dr. Clarkston, but all were expressly based only the objection that White had raised about her appearance three years earlier on *Supernanny*.[8] White again urged BESE to disapprove the application, explaining that the objection he had expressed earlier about Dr. Clarkston's appearance on the program had not been alleviated.[9] In March 2016, BESE voted to disapprove the application; it gave no reasons of its own for that action.

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[7] Doc. 9-1, p. 6. This document refers to the views of "LDE," the Louisiana Department of Education. In the litigation below, the Department and its head, defendant White, are referred to interchangeably.

[8] Without question, Mrs. Clarkston's deficiencies in any given norm resulted solely from Mrs. Clarkston's decision to participate in the reality show *Supernanny* and/or the related publicizing of her participation [on] that television show just three (3) short years ago.

App. 4a.

[9] Doc. 9-1, p. 7.

Proceedings Below

Dr. Clarkston and Kingdom Builders brought this action against White in federal district court, alleging that White had violated their First Amendment rights by successfully opposing the charter school application because Dr. Clarkston had appeared on *Supernanny.* The plaintiffs asserted that White's adverse recommendation had caused BESE to reject the charter school application, causing financial injury to Clarkston.[10] The complaint sought redress under the private cause of action in section 1983. The district court had jurisdiction pursuant to 28 U.S.C. § 1331.

After a period of discovery, White moved for summary judgment on a variety of grounds. The district court concluded that White's "primary concern" in opposing the application was Dr. Clarkston's appearance on the television show. App. 10a. The district judge did not address whether denying the application on that ground violated the First Amendment, or whether by 2015 Dr. Clarkston had a clearly established constitutional right to appear on the television program. Instead, the district court held, somewhat surprisingly, that there was no evidence that White's repeated opposition had caused BESE to reject the charter school application. "Plaintiffs ... have not shown that Superintendent White caused them to suffer an injury...." App. 14a-15a.

On appeal, the Fifth Circuit affirmed the award of summary judgment, but on a different ground. Like

[10] Doc. 1, pp. 1-4.

the district court, the Court of Appeals did not resolve the merits of Dr. Clarkston's First Amendment claim; nor did it address whether her First Amendment rights were clearly established when White allegedly retaliated against her in 2015 and 2016. Instead, the Fifth Circuit held that White was entitled to qualified immunity because at the time of the alleged First Amendment violation it was not clear that an official in White's position was subject to suit at all under section 1983, no matter how clear the alleged constitutional violation. The problem, according to the court of appeals, was that White had merely recommended that the charter application be denied; the final decision was actually made by BESE. "It [was] not clearly established in this circuit whether [non-final decisionmakers] may be held personally liable for First Amendment retaliation under § 1983." (quoting *Pennypacker v. City of Pearl*, 689 Fed.App'x 332, 332 (5th Cir. 2017) (per curiam)). App. 8a n.5.

> At the time White allegedly violated plaintiffs' rights ... this court's jurisprudence was ambiguous regarding whether First Amendment liability could attach to a public official who did not possess final decisionmaking authority. Because White was not a final decisionmaker, it was not clearly established that he could be liable for his recommendation to the BESE.

App. 8a.

REASONS FOR GRANTING THE WRIT

I. THERE IS AN IMPORTANT CIRCUIT CONFLICT REGARDING WHETHER QUALIFIED IMMUNITY CAN BE AWARDED, DESPITE THE VIOLATION OF A CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT, BASED MERELY ON UNCERTAINTY AS TO THE AVAILABILITY OF RELIEF UNDER SECTION 1983

This is the most recent of a series of Fifth Circuit decisions holding that qualified immunity can be based on uncertainty as to the availability of relief under section 1983, even though the constitutional right at issue was clearly established. Every other circuit has expressly held that the existence of a clearly established constitutional right precludes qualified immunity.

A. The Fifth Circuit Recognizes Qualified Immunity, Despite A Violation of A Clearly Established Constitutional Right, If The Availability of Relief Under Section 1983 Was Not Clearly Established

Since 2015, the Fifth Circuit has held that a defendant is entitled to qualified immunity, even if he or she violates the clearly established constitutional rights of the plaintiff, if there was uncertainty as to whether those rights could be enforced in an action "under section 1983." *Culbertson v. Lykos*, 790 F.3d 608, 627 (5th Cir. 2015) (qualified immunity because it was "unsettled" whether the plaintiff could obtain relief "under section 1983"); *Pennypacker v. City of Pearl*, 689

Fed.App'x 332, 332 (5th Cir. 2017) (per curiam) (qualified immunity because "[i]t is not clearly established in this circuit" whether the plaintiff could obtain relief "under § 1983"); *Sims v. City of Madisonville*, 894 F.3d 632, 641 (5th Cir. 2018) (same); App. 8a n.5.

This new type of qualified immunity is fundamentally different from the qualified immunity recognized by this Court, and all other circuits, because it concerns uncertainty about the availability of relief under section 1983, not (as elsewhere) uncertainty as to whether the defendant's conduct violated the federal Constitution or laws. Section 1983 provides the private cause of action that is usually invoked to seek redress for constitutional violations. Although section 1983 itself creates no substantive rights, there has been and remains considerable litigation about when, against whom, under what circumstances, and for what remedies a plaintiff may maintain a civil action under that section. The procedural and remedial issues that arise about the scope of section 1983 actions are fundamentally different in kind from disputes about the scope of substantive constitutional rights.

Traditional qualified immunity law rests on the premise that government officials should not be subject to suit for damages unless the state of the relevant caselaw provides them with notice as to what *conduct* is unlawful. Those officials cannot be "expected to predict the future course of constitutional law." *Procunier v. Navarette*, 434 U.S. 555, 562 (1978). The novel Fifth Circuit qualified immunity doctrine rests on the premise that government officials are also entitled to fair

warning regarding whether section 1983 will be construed to provide a *remedy* for a particular constitutional violation. "[L]aw enforcement officials should not be expected to have a ... nuanced understanding of section 1983 law." *Sims v. City of Madisonville*, 894 F.3d at 641. So in the Fifth Circuit it is not sufficient that a plaintiff's constitutional rights were clearly established; a defendant is entitled to qualified immunity, despite the clarity of those substantive legal rights, if there was uncertainty as to whether the official could be sued under section 1983.

In the 2015 Fifth Circuit decision in *Culbertson*, the plaintiffs alleged that an Assistant District Attorney had retaliated against them because the plaintiffs had made a statement to the local newspaper that the city's breath alcohol testing equipment might be defective, and because one of the plaintiffs had so testified when subpoenaed in several criminal cases. The Fifth Circuit acknowledged that "speech about the unreliability of the breath alcohol testing can be considered a matter of public concern." 790 F.3d at 619, and that "there is enough in the complaint to support the claim that [the defendant]'s actions violated the plaintiffs' constitutional rights." 790 F.3d at 627. The plaintiffs worked for a local firm that had a longstanding contract to analyze the data from the city's breath alcohol testing machines. The Assistant District Attorney recommended to county officials that they not renew the firm's contract, and the complaint alleged that her recommendation caused those county officials to end the county contract with the firm. 790 F.3d at 615-16. The

termination of that contract resulted in the dismissal of the plaintiffs. The Fifth Circuit recognized that this likely violated the Constitution, and did not question whether the plaintiffs' constitutional rights were clearly established. The court of appeals nonetheless held that the Assistant District Attorney was entitled to qualified immunity, on the ground that it was not clear whether in a section 1983 action a plaintiff could obtain relief against an official who violated the Constitution but who was not herself the final decisionmaker. "It was unsettled at the time of [the Assistant District Attorney's] actions, and remains so now, whether someone who is not a final decisionmaker and makes a recommendation that leads to the plaintiff being harmed can be liable for retaliation under Section 1983." 790 F.3d at 627.

In *Pennypacker*, the plaintiffs alleged that they had been fired because they had reported misuse of city resources. The city's mayor fired the plaintiffs, but his decision was subject to review by the city Board of Aldermen, which sustained the terminations. 689 Fed.App'x at 332. The Fifth Circuit did not address whether the dismissal, if retaliatory, violated the plaintiffs' clearly established First Amendment right. Instead, the court of appeals held that the mayor and another official was entitled to qualified immunity because they were "not the final decision-makers responsible for their terminations." *Id*. "It is not clearly established in this circuit whether these individual defendants may be personally liable for First Amendment retaliation under § 1983."

In *Sims*, the plaintiff alleged that he was retaliated against by his supervisor for having reported to higher ranking officials, and to the Texas Rangers, that the supervisor was attempting to plant drugs on a third party. The plaintiff asserted that the retaliation violated his First Amendment rights, but the Fifth Circuit did not resolve whether Sims had a clearly established constitutional right to report the alleged misconduct. Instead, the court of appeals held that the supervisor was entitled to qualified immunity. The supervisor had the authority to "make a disciplinary recommendation," and the plaintiff alleged that the supervisor engineered the plaintiff's dismissal by providing false information to higher officials. 894 F.3d at 640 and n.3. The final decision to dismiss the plaintiff, however, had been made by a higher ranking official. The court of appeals reasoned that, even if the supervisor had caused Sims' dismissal, and had done so for an unconstitutional purpose, he was still entitled to qualified immunity because at the time it was unclear whether in a section 1983 action "liability can attach to a public official who did not make the final employment decision...." 894 F.3d at 641.[11]

As these Fifth Circuit decisions make clear, because this novel type of qualified immunity rests on a showing of uncertainty as to the availability of a remedy under section 1983, this form of qualified immunity is available regardless of whether the defendant's

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[11] The Fifth Circuit also applied this qualified immunity doctrine in *Buchanan v. Alexander*, 919 F.3d 847, 856 (5th Cir. 2019) (quoting *Sims*).

actions violated clearly established constitutional rights. The Fifth Circuit emphasized in *Johnson v. Louisiana*, 369 F.3d 826 (5th Cir. 2004), a decision cited in *Sims*, *Pennypacker* and *Culbertson*, that defendants who merely recommended (but caused) adverse actions against a plaintiff "could not be liable under § 1983 if they did not make the final decision ... , 'no matter how unconstitutional their motives.' " 369 F.3d at 831 (quoting *Beattie v. Madison County School Dist.*, 254 F.3d 595, 605 (5th Cir. 2001)); see *Kermode v. University of Mississippi Medical Center*, 2010 WL 2683095 at *3 (S.D.Miss. July 2, 2010) (defendants not liable "no matter how unconstitutional their motives" (citing *Johnson*)); *Oscar Renda Contracting, Inc. v. City of Lubbock, Texas*, 2008 WL 11429735 at *18 (N.D.Tex. March 28, 2008) (same).

District courts in the Fifth Circuit have repeatedly applied that circuit's novel qualified immunity doctrine. *Davis v. Matagorda County*, 2019 WL 1015341 at *9, *12 (S.D.Tex. March 4, 2019) (defendant entitled to qualified immunity in First Amendment case even though "the Court finds that [the plaintiff] has sufficiently alleged that he spoke as a citizen on a matter of public concern"); *Smith v. City of Madison, Mississippi*, 346 F.Supp.3d 656, 661-62, 662 (N.D.Miss. 2018) (defendant entitled to qualified immunity in First Amendment case even though plaintiff's speech was about a matter of "quintessential public concern"); *Robin v. City of Frisco, Texas*, 2017 WL 5483883 at *18 (E.D.Tex. Nov. 15, 2017) (defendant entitled to qualified immunity in First Amendment case even though

"[i]t is undisputed that Plaintiff engaged in conduct protected by § 1981 when she filed a formal charge of race discrimination...."); *Powers v. Northside Ind. School Dist.*, 143 F.Supp.3d 545, 550-51 (W.D.Tex. 2015) (defendant entitled to qualified immunity even though the complaint "adequately stated a ... claim for First Amendment retaliation against [the defendant]."); *Sockwell v. Town of Calhoun City, Mississippi*, 2019 WL 3558173 at *3 (N.D.Miss. Aug. 5, 2019); *Papin v. University of Mississippi Medical Center*, 347 F.Supp.3d 274, 278 (S.D.Miss. 2018); *El-Bawab v. Jackson State University*, 2018 WL 543040 at *6 (S.D.Miss. Jan. 24, 2018); *Buchanan v. Alexander*, 284 F.Supp.3d 792, 811-14 (M.D.La. 2018).

B. All Other Circuits Limit Qualified Immunity To Cases in Which The Plaintiff's Constitutional Rights Were Not Clearly Established

Every circuit other than the Fifth has consistently held that qualified immunity is not available if the defendant's conduct violated the plaintiff's clearly established constitutional right. Outside the Fifth Circuit, the dispositive issue raised by an assertion of qualified immunity is whether the constitutional rights asserted by the plaintiff were clearly established at the time of the alleged violation. If they were, qualified immunity is uniformly rejected.

As the Fourth Circuit explained, in terms that are the precise opposite of the Fifth Circuit rule, "[i]n

evaluating whether qualified immunity exists, we must keep in mind that it is the plaintiff's constitutional *right* that must be clearly established, not a plaintiff's access to a monetary *remedy*." *Owens v. Baltimore City State's Attorneys Office*, 767 F.3d 379, 398 (4th Cir. 2014) (emphasis in original).

In *Tejada-Batista v. Morales*, 424 F.3d 97 (1st Cir. 2005), after a jury finding of intentional retaliation against a plaintiff who had engaged in constitutionally protected speech, the defendant suggested that he was still entitled to qualified immunity. The defendant conceded that the plaintiff's speech was "protected speech under the governing case law." 424 F.3d at 100. The First Circuit summarily rejected the claim of qualified immunity, commenting "[g]iven that the jury almost surely found that appellants' *purpose* was improper retaliation, it is not clear how a qualified immunity defense could easily have prevailed." *Id.* at 103 (emphasis in original).

More broadly, every circuit other than the Fifth has expressly held that qualified immunity is barred if the alleged actions violated the plaintiff's clearly established constitutional rights.

First Circuit

Bisbal-Ramos v. City of Mayaguez, 467 F.3d 16, 25 (1st Cir. 2006) (emphasis added):

> A public officer is *not* entitled to qualified immunity if he violated a plaintiff's constitutional

> right and if, at the time of the violation, the right was so clearly established that it would have been clear to a reasonable officer that his conduct was unlawful in the situation he confronted.

Rivera v. Murphy, 979 F.2d 259, 262-63 (1st Cir. 1992) (opinion joined by Breyer, J.) (emphasis added):

> The Supreme Court announced the general rule of qualified immunity in *Harlow* [*v. Fitzgerald*], when it stated that "government officials performing discretionary functions, generally are shielded from liability for civil damages *insofar as* their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. [800,] 818 [(1982)].

Cookish v. Powell, 945 F.2d 441, 442 (1st Cir. 1991) (per curiam) (opinion joined by Breyer, J.) (quoting *Morales v. Ramirez*, 906 F.2d 784, 787 (1st Cir. 1990)) (emphasis added):

> Qualified immunity operates to shield government officials exercising discretionary powers from liability for civil damages *insofar as* their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Second Circuit

Ford v. McGinnis, 352 F.3d 582, 597 (2d Cir. 2003) (opinion by Sotomayor, J.) (quoting *Williams*

v. Greifinger, 97 F.3d 699, 703 (2d Cir. 1996)) (emphasis added):

> Summary judgment for defendants on grounds of qualified immunity is ... appropriate "*only* 'if the court find that the asserted rights were not clearly established, or if ... no rational jury could fail to conclude that it was objectively reasonable for the defendants to believe that they were acting in a fashion that did not violate a clearly established right.'"

Coggins v. Buonora, 776 F.3d 108, 114 (2d Cir. 2015) (quoting *Salim v. Proulx*, 93 F.3d 86, 89 (2d Cir. 1996)) (emphasis added):

> Qualified immunity protects public officials from civil liability *only* "if (a) the defendant's action did not violate clearly established law, or (b) it was objectively reasonable for the defendant to believe that his action did not violate such law."

Third Circuit

League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania, 921 F.3d 378, 386 n.5 (3d Cir. 2019) ("An official is *not* entitled to qualified immunity if the official violates a 'clearly established' right....") (emphasis added); *McGreevy v. Stroup*, 413 F.3d 359, 364 (3d Cir. 2005) ("Defendants are entitled to qualified immunity *only* if the constitutional or statutory violation alleged is not clearly established.") (emphasis added); *Davenport v. Borough of Homestead*, 870 F.3d

273, 281 (3d Cir. 2017) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)) (emphasis added):

> [A]n officer is not entitled to qualified immunity if "at the time of the challenged conduct, the contours of [the] right [were] sufficiently clear that every reasonable official would have understood that what he [was] doing violates that right."

Fourth Circuit

Hupp v. Cook, 931 F.3d 307, 317 (4th Cir. 2019) ("An official is *not* entitled to qualified immunity if he or she deprived an individual of a constitutional right and that right was clearly established at the time of the violation.") (emphasis added); *Graham v. Gagnon*, 831 F.3d 176, 812 (4th Cir. 2016) ("The shield of qualified immunity is *lost* when a government official (1) violates a constitutional right and (2) that right was clearly established.") (emphasis added); *Altman v. City of High Point, North Carolina*, 330 F.3d 194, 210 (4th Cir. 2003) ("an officer is *not* entitled to qualified immunity when he violates clearly established federal law.") (emphasis added).

Sixth Circuit

Oliver v. Buckberry, 687 Fed.App'x 480, 483 (6th Cir. 2017) ("[A]n official is *not* entitled to qualified immunity if, viewing the fact in the light most favorable to the plaintiff, the record shows that (1) the officer violated a constitutional right and (2) the right was clearly

established at the time of the violation.") (emphasis added); *Whitney v. City of Milan*, 677 F.3d 292, 298 (6th Cir. 2012) ("[Defendant] is entitled to qualified immunity *only* if the right was not clearly established such that 'a reasonable official would understand that what he is doing violates' the [Constitution]."") (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)) (emphasis added); *Joseph v. Patterson*, 795 F.3d 549, 560 (6th Cir. 1986) ("*If* the law which the defendant's conduct is alleged to have violated is clearly established, then the qualified immunity defense must *fail*...") (emphasis added); *Jackson v. Leighton*, 168 F.3d 903, 909 (6th Cir. 1999) (quoting *Hutsell v. Sayre*, 5 F.3d 996, 1003 (6th Cir. 1993)) (emphasis added):

> A defendant is *not* entitled to qualified immunity if the plaintiff asserts a violation of a known civil constitutional right, and "the constitutional right was so clearly established at the time in question that a reasonable official in the defendant's position would have known that he was violating the plaintiff's constitutional rights."

Seventh Circuit

Lenea v. Lane, 882 F.2d 1171, 1177 (7th Cir. 1989) ("[Q]ualified immunity is available *only if* the official's conduct did not violate 'clearly established constitutional rights of which a reasonable person would have known.'") (quoting *Conner v. Reinhard*, 847 F.2d 384, 387-88 (7th Cir. 1988)) (emphasis added).

Eighth Circuit

Triplett v. Palmer, 592 Fed.App'x 534, 535 (8th Cir. 2015) ("Defendants are *not* entitled to qualified immunity if the facts construed in a light most favorable to [the plaintiff] establish a violation of his constitutional rights, and if the right was clearly established at the time of the alleged violation.") (emphasis added); *Moran v. Clarke*, 359 F.3d 1058, 1061 (8th Cir. 2004) ("[Defendants] are *not* entitled to qualified immunity if they had 'fair warning' that their conduct violated [the plaintiff's] rights." (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002))) (emphasis added); *Harrison v. Dahm*, 911 F.3d 37, 40 (8th Cir. 1990) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) ("An official is *not* entitled to qualified immunity if the contours of the right allegedly violated are "sufficiently clear that a reasonable official would understand that what he is doing violates that right.") (emphasis added).

Ninth Circuit

Thompson v. Rahr, 885 F.3d 582, 585 (9th Cir. 2018) ("Police officers are *not* entitled to qualified immunity if (1) the fact '[t]aken in the light most favorable to the part asserting injury' show that 'the [officers'] conduct violated a constitutional right' and (2) 'the right was clearly established' at the time of the alleged violation.") (quoting *Saucier v. Katz*, 533 U.S. at 201) (emphasis added); *Davis v. United States*, 854 F.3d 594, 599 (9th Cir. 2017) ("A defendant is *not* entitled to qualified immunity if 'the facts that a plaintiff has alleged or

show make out a violation of a constitutional right,' and that right was '"clearly established" at the time of [the] defendant's alleged misconduct.'") (quoting *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)) (emphasis added); *Morgan v. Morgensen*, 465 F.3d 1041, 1046 (9th Cir. 2006) ("A[n] ... official is *not* entitled to qualified immunity if the law governing his conduct was clearly established such that a reasonable ... official would know that his conduct was unlawful.") (emphasis added); *Osolinski v. Kane*, 92 F.3d 934, 936 (9th Cir. 1996) ("A public official is *not* entitled to qualified immunity when the contours of the allegedly violated right were 'sufficiently clear that a reasonable official would understand that what he [was] doing violate[d] that right.'") (quoting *Allen v. Sakai*, 48 F.3d 1082, 1087 (9th Cir. 1995)) (emphasis added); *Lowe v. City of Monrovia*, 775 F.2d 998, 1011 (9th Cir. 1986) ("Government officials are entitled to qualified immunity *only* if a reasonable person would not have been aware that the actions at issue violated well established ... constitutional rights.") (emphasis added).

Tenth Circuit

A.M. v. Holmes, 830 F.3d 1123, 1134 (10th Cir. 2016) ("The defense of qualified immunity 'protects governmental officials from liability for civil damages *insofar as* their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."'") (opinion joined by Gorsuch, J.) (quoting *Weise v. Casper*, 593 F.3d 1163, 1166 (10th Cir. 2010)) (emphasis added); *Blackmon v.*

Sutton, 734 F.3d 1237, 1239 (10th Cir. 2013) ("True, qualified immunity is strong stuff: the defense shields public officials from suit *as long as* their conduct didn't infringe any legal rights clearly established at the time.") (opinion by Gorsuch, J.) (emphasis added).

Eleventh Circuit

Johnson v. Houston County Georgia, 758 Fed.App'x 911, 915 (11th Cir. 2018) ("qualified immunity offers *no* protection if the plaintiff can show that the defendant ... violated a constitutional right that was clearly established at the time of the misconduct.") (emphasis added); *Bruce v. Beary*, 498 F.3d 1232, 1249 (11th Cir. 2007) ("the officers are entitled to qualified immunity *only if* the law regarding the [constitutional right at issue] was not clearly established at the time the [violation] occurred.") (emphasis added); *Grayden v. Rhodes*, 345 F.3d 1225, 1231 (11th Cir. 2003) ("a government official is *not* entitled to qualified immunity if his or her conduct violated a clearly established ... constitutional right and if the contours of the right were defined with such clarity that a reasonable official would have understood, at the time, that the conduct at issue violated that right.") (emphasis added).

District of Columbia Circuit

Hedgpeth v. Rahim, 893 F.3d 802, 806 (D.C.Cir. 2018) ("The doctrine of qualified immunity shields officials from civil liability *so long as* their conduct 'does not violate clearly established ... constitutional rights of

which a reasonable person would have known.' ") (quoting *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015)) (opinion joined by Kavanaugh, J.) (emphasis added); *Flythe v. District of Columbia*, 791 F.3d 13, 18 (D.C.Cir. 2015) ("An official sued under § 1983 is entitled to qualified immunity *unless* it is shown that the official violated a ... constitutional right that was clearly established at the time of the challenged conduct.") (quoting *Plumhoff v. Rickard*, 134 S.Ct. 2012, 2023 (2014)) (opinion joined by Kavanaugh, J.) (emphasis added); *Atherton v. District of Columbia Office of the Mayor*, 706 F.3d 512, 515 (D.C.Cir. 2013) ("Qualified immunity shields government officials from civil damages *unless* the official violated a ... constitutional right that was clearly established at the time of the challenged conduct.") (quoting *Reichle v. Howards*, 132 S.Ct. 2088, 2093 (2012)) (opinion joined by Kavanaugh, J.) (emphasis added); *International Action Center v. U.S.*, 365 F.3d 20, 24 (D.C.Cir. 2004) ("Qualified immunity protects government officials 'from liability for civil damages *insofar as* their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' ") (quoting *Harlow v. Fitzgerald*, 457 U.S. at 818) (opinion by Roberts, J.) (emphasis added): *Martin v. District of Columbia Police Dept.*, 812 F.2d 1425, 1432 (D.C.Cir. 1987) ("The Supreme Court in *Harlow* held that 'government officials performing discretionary functions, generally are shielded from liability for civil damages *insofar as their conduct does not violate clearly established rights* of which a reasonable person would have known.' ... 'Whether an official may prevail in this

qualified immunity defense depends upon the "objective reasonableness of [his] conduct as measured by reference to clearly established law." No other "circumstances" are relevant to this issue of qualified immunity.' ") (quoting *Harlow v. Fitzgerald*, 457 U.S. at 818, and *Davis v. Scherer*, 468 U.S. 183, 183 (1984)) (opinion by Ruth Bader Ginsburg, J.) (emphasis in court of appeals opinion); *Martin v. Malhoyt*, 830 F.2d 237, 252 (D.C.Cir. 1987) ("defendants are entitled to raise the federal 'qualified immunity' plea, as developed in *Harlow* and progeny, wherein they are 'shield[ed] ... from civil damages liability *as long as* their actions could reasonably have been thought consistent with the rights they are alleged to have violated.' ") (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)) (opinion by Ruth Bader Ginsburg, J.) (emphasis added).

Consistent with these decisions, courts of appeals other than the Fifth Circuit have repeatedly held that when qualified immunity is asserted, the sole, controlling issue is whether the defendant's conduct violated a clearly established right of the plaintiff, a holding that precludes consideration of the separate question of whether the existence of a remedy under section 1983 were clearly established. "The only question was whether [the defendants' actions] violated 'clearly established' law." *La v. Hayducka*, 122 Fed.App'x 557, 558 (3d Cir. 2004) (opinion joined by Alito, J.); see *Toms v. Taft*, 338 F.3d 519, 523 (6th Cir. 2003) ("the only question"); *Skrtich v. Thornton*, 280 F.3d 1295, 1302-03 (11th Cir. 2002) ("the only question"). "[T]the dispositive question is whether there was a 'fair and clear

warning of what the Constitution requires.'" *Dean v. Searcy*, 893 F.3d 504, 518 (8th Cir. 2018) (quoting *City & County of San Francisco v. Sheehan*, 135 S.Ct. 1765, 1778 (2015)). "The relevant question is whether 'the state of the law at the time gives officials fair warning that their conduct is unconstitutional.'" *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1064 (9th Cir. 2013) (quoting *Bull v. City & County of San Francisco*, 595 F.3d 964, 1003 (9th Cir. 2010)); see *Jackson v. Stair*, 938 F.3d 966, 972 (8th Cir. 2019) ("[t]he relevant question"); *Hopper v. Plummer*, 887 F.3d 744, 756 (6th Cir. 2018) ("[t]he relevant question").

Most members of this Court, while serving on a court of appeals, wrote or joined opinions holding that qualified immunity is limited to cases in which the plaintiff's constitutional right was not clearly established. The Chief Justice, while serving on the District of Columbia Circuit, wrote the opinion in *International Action Center v. U.S*. Justice Breyer, while serving on the First Circuit, joined the decisions in *Cookish v. Powell* and *Rivera v. Murphy*. Justice Ginsburg, while serving on the District of Columbia Circuit, wrote the opinions in *Martin v. District of Columbia Police Dept*. and *Martin v. Malhoyt*. Justice Alito, while on the Third Circuit, joined the opinion in *La v. Hayducka*. Justice Sotomayor, while on the Second Circuit, wrote the opinion in *Ford v. McGinnis*. Justice Gorsuch, while on the Third Circuit, wrote the opinion in *Blackmon v. Sutton* and joined the opinion in *A.M. v. Holmes*. Justice Kavanaugh, while serving on the District of Columbia Circuit, joined the opinions in *Hedgpeth v.*

Rahim, *Flythe v. District of Columbia*, and *Atherton v. District of Columbia Office of the Mayor*.

II. THE FIFTH CIRCUIT'S NEW QUALIFIED IMMUNITY DOCTRINE IS PALPABLY INCONSISTENT WITH THIS COURT'S QUALIFIED IMMUNITY DECISIONS

The Fifth Circuit's novel qualified immunity rule is not merely unsound; it flouts almost half a century of this Court's qualified immunity decisions. Since 1975, this Court has with complete consistency made clear, time and time again, that qualified immunity is not available if a defendant violated the plaintiff's clearly established constitutional rights. None of the Fifth Circuit decisions applying its idiosyncratic qualified immunity rule, which dramatically alters the balance struck by this Court's qualified immunity decisions, even attempts to explain how this additional form of immunity could be reconciled with this Court's decisions.

The Court's seminal qualified immunity decision in *Wood v. Strickland*, 420 U.S. 308 (1975), made clear that "a [defendant] is *not* immune from liability for damages under § 1983 *if* he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [individual] affected." 420 U.S. at 322 (emphasis added).[12] "Whe[n] an asserted federal

[12] *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1867 (2017) ("a court must ask whether it would have been clear to a reasonable officer

right was clearly established at a particular time, ... a public official who allegedly violated the right has *no* qualified immunity from suit...." *Elder v. Holloway*, 510 U.S. 510, 516 (1994) (emphasis added). "*Harlow v. Fitzgerald* makes immunity available *only* to officials whose conduct conforms to a standard of 'objective legal reasonableness.'" *Davis v. Scherer*, 468 U.S. 183, 193 (1984) (quoting *Harlow*, 457 U.S. at 819) (emphasis added). "Our cases ... provid[e] government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability *so long as* their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (emphasis added).[13] "Qualified immunity shields government officials from civil damages liability *unless* the official violated a statutory or constitutional right that was clearly established at the time of

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that the alleged conduct 'was unlawful in the situation he confronted.' ... *If* so, then the defendant officer ... [is] not entitled to qualified immunity.") (emphasis added) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)); *Hope v. Pelzer*, 536 U.S. 730, 746 (2002) ("no immunity is available for official acts *when* 'it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'") (emphasis added) (quoting *Saucier*, 533 U.S. at 202); *Procunier v. Navarette*, 434 U.S. 555, 562 (1978) ("the immunity defense would be unavailing ... *if* the constitutional right allegedly infringed by them was clearly established at the time of their challenged conduct....") (emphasis added).

[13] See *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015) (qualified immunity only available "so long as" no clearly established constitutional right was violated).

the challenged conduct." *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (emphasis added).[14]

The Fifth Circuit held that the defendant was entitled to qualified immunity because at the time of the alleged constitutional violation "[i]t [was] not clearly established in this circuit whether [non-final decisionmakers] may be held personally liable ... under § 1983." App. 8a n.5 (quoting *Pennypacker v. City of Pearl*, 689 Fed.App'x at 332). But in sixteen decisions this Court has made clear that the only thing that must be "clearly established" to defeat qualified immunity is the existence of the statutory or constitutional right asserted by the plaintiff. "Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *City of Escondido, California v. Emmons*, 139 S.Ct. 500 (2019) (per curiam).[15]

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[14] See *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (qualified immunity available "unless" defendant violated a clearly established constitutional or statutory right); *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) ("unless"); *Elder v. Holloway*, 510 U.S. 510, 512 (1994) ("unless"); *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985) ("unless").

[15] See *Kisela v. Hughes*, 138 S.Ct. 1148, 1152 (2018) ("clearly established statutory or constitutional rights"); *District of Columbia v. Wesby*, 138 S.Ct. 577, 590 (2018) ("[t]he 'clearly established' standard ... requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him"); *White v. Pauly*, 137 S.Ct. 548, 551 (2017) ("clearly established statutory or constitutional rights"); *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015) ("clearly established statutory or constitutional rights"); *Reichle v. Howards*, 566 U.S. 658, 664 (2012) ("statutory

The lower courts are not free to create a second type of qualified immunity, or to insist that a plaintiff who demonstrates a violation of clearly established constitutional rights must *also* show that the availability of relief "under section 1983" too was clearly established at the time of the alleged violation. "*All* [a court] need determine is ... whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions." *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985) (emphasis added). "Whether an official may prevail in his qualified immunity defense depends upon the 'objective reasonableness of [his] conduct as measured by reference to

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or constitutional right that was clearly established at the time of the challenged conduct."); *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 ("the right was 'clearly established' "), 741 ("[t]he contours of [a] right [are] sufficiently clear") (2011); *Pearson v. Callahan*, 555 U.S. 223, 231 ("violate clearly established statutory or constitutional rights"), 232 ("violated a clearly established constitutional right"), 237 ("[whether] a constitutional right is not clearly established") (2009); *Hope v. Pelzer*, 536 U.S. 730, 739 ("clearly established statutory or constitutional rights"; "[f]or a constitutional right to be clearly established"), 740 ("a constitutional right was 'clearly established' ") (2002); *Saucier v. Katz*, 533 U.S. 194, 201 ("whether the right was clearly established"), 202 ("in determining whether a right is clearly established") (2001); *Wilson v. Layne*, 526 U.S. 603, 615 (1999) ("[whether] the right allegedly violated ... was clearly established"); *Elder v. Holloway*, 510 U.S. 510, 516 (1994) ("[w]hether an asserted federal right was clearly established at a particular time"); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("the right the official is alleged to have violated must have been 'clearly established' "); *Davis v. Scherer*, 468 U.S. 183, 197 (1984) ("rights were clearly established"); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("clearly established statutory or constitutional rights"); *Butz v. Economou*, 438 U.S. 478, 507 (1978) ("clearly established constitutional limits").

clearly established law.' ... No other 'circumstances' are relevant to the issue of qualified immunity." *Davis v. Scherer*, 468 U.S. 183, 191 (1984) (quoting *Harlow*, 457 U.S. at 818). "The dispositive question is 'whether the violative nature of particular conduct is clearly established.'" *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015) (quoting *Ashcroft v. al-Kidd*, at 742) (emphasis omitted). This Court has resisted efforts to create exceptions to the general qualified immunity standard, stressing that "qualified immunity reflects a balance that has been struck 'across the board.'" *Anderson v. Creighton*, 483 U.S. 635, 642 (1987) (quoting *Harlow*, 457 U.S. at 821 (Brennan, J., concurring)). It is particularly inconsistent with this Court's qualified immunity decisions to recognize, as has the Fifth Circuit, a new form of qualified immunity that protects government officials who knowingly violate federal law, "no matter how unconstitutional their motives."

The stated purpose of qualified immunity is "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier v. Katz*, 533 U.S. 194, 206 (2001); see *Hope v. Pelzer*, 536 U.S. 730, 739-40 (2002) ("entitled to 'fair warning' that his conduct deprived his victim of a constitutional right"); *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) ("the focus is on whether the officer had fair notice that her conduct was unlawful"). The Fifth Circuit believes that an official who knows that his action violates the Constitution has not been given adequate warning; he is *also* entitled to advance notice as to whether, if he chooses to deliberately break the law, section 1983 will

provide a private cause of action entitling the victim to monetary relief. "[L]aw enforcement officials should not be expected to have a ... nuanced understanding of section 1983 law." *Sims v. City of Madisonville*, 894 F.3d at 641. But a government official sworn to uphold the Constitution and laws of the United States need not also be given notice, and should not care, whether knowingly engaging in unlawful conduct will be expensive. Government officials may be entitled to notice of what conduct will violate federal law, but they have no right to know in advance whether they will get away with a knowing violation scot free. "[I]t is not unfair to hold liable the official who knows or should know he is acting outside the law...." *Butz v. Economou*, 438 U.S. 478, 506 (1978). "Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate...." *Harlow v. Fitzgerald*, 457 U.S. at 819. Members of the public whose lives, liberty and property are affected by government action have a right to expect that government officials will obey clearly established federal law at all times, not obey that law only when doing otherwise would foreseeably be costly.

The Fifth Circuit's suggestion that officials ought to have notice as to whether they will suffer actual financial injury—not merely to notice that they are violating the Constitution—calls into question the entire corpus of qualified immunity law. Government agencies almost invariably indemnify their employees for claims arising out of official activities, either by law, by custom, or under collective bargaining agreements. If

the purpose of qualified immunity were to protect government officials from unanticipated financial harm, it would be essentially unnecessary.

As this Court explained in *Ziglar v. Abassi,*

> [t]he qualified immunity rule seeks a proper balance between two competing interests. On one hand, damages suits "may offer the only realistic avenue for vindication of constitutional guarantees."... "On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties."

137 S.Ct. 1843, 1866 (2017) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) and *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)). The lower courts are not at liberty to alter the balance struck by this Court, either to create greater grounds for liability or, as here, to devise novel additional restrictions on the availability of redress for knowing violations of the Constitution. "Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, ... it cannot limit a cause of action that Congress has created merely because 'prudence' dictates." *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014).

Because of the importance this Court attaches to the balance struck by its qualified immunity decisions, it has repeatedly granted review to correct erroneous

applications of those decisions,[16] even when the errors involve only fact-bound disputes presenting no general issue of law.[17] Just as the substance of qualified immunity jurisprudence involves a balance of the interests of government officials and of victims of constitutional violations, so too should there be balance in the manner in which this Court exercises its discretionary jurisdiction to assure compliance with its qualified immunity decisions. Certiorari is particularly warranted here because the instant case presents a distinct question of law, applied in more than a dozen decisions in the Fifth Circuit, and a clear circuit conflict.

[16] *E.g.*, *City of Escondido, California v. Emmons*, 139 S.Ct. 500 (2019) (per curiam); *Kisela v. Hughes*, 138 S.Ct. 1148 (2018) (per curiam); *District of Columbia v. Wesby*, 138 S.Ct. 577 (2018); *White v. Pauly*, 137 S.Ct. 548 (2017) (per curiam); *Mullenix v. Luna*, 136 S.Ct. 305 (2015) (per curiam).

[17] *E.g.*, *City of Escondido*, 139 S.Ct. at 503 ("[i]n this case, the Court of Appeals contravened ... settled principles"); *Kisela*, 138 S.Ct. at 1153 ("That is a necessary part of the qualified-immunity standard, and it is a part of the standard that the Court of Appeals here failed to implement in a correct way").

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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